No. 15,337

IN THE

United States Court of Appeals

For the Ninth Circuit

CENTENNIAL INSURANCE COMPANY, a Corporation,
Appellant,

vs.

DAVE SCHNEIDER, Doing Business as Dave Schneider Wholesale Jewelry,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal from a final judgment of the District Court of the United States for the Southern District of California, Central Division, Honorable Thurmond Clarke, Judge Presiding.

JURISDICTION.

The action was originally filed in the Superior Court of the State of California, in and for the County of Los Angeles, by Dave Schneider, a citizen of California, against Centennial Insurance Company, a New

York corporation. The amount in controversy was in excess of $3,000.

Upon the petition of defendant, the action was removed to the District Court of the United States on the basis of the diverse citizenship of the parties.

The jurisdiction of the District Court was based upon sections 1332 and 1441 of Title 28 United States Code. The jurisdiction of this court is based upon section 1291 of Title 28 United States Code.

The petition for removal is found at page 3 of the transcript. The jurisdictional allegations are on pages 4 and 5. The notice of appeal is on page 38.

STATEMENT OF THE CASE.

Plaintiff (appellee) is a Long Beach wholesale jeweler. On August 15, 1954, defendant (appellant) issued to him a jewelers' block policy of insurance (plaintiff's Exhibit 1) the purpose of which was to insure his stock in trade.

The insured property was described as follows in the policy:

> "(a) Pearls, precious and semi-precious stones, jewels, jewelry, watches and watch movements, gold, silver, platinum, other precious metals and alloys and other stock usual to the conduct of the Assured's business, owned by the Assured."

In the course of selling to retail stores, plaintiff travels by car with jewelry of considerable value which he carries in two specially fitted cases (weigh-

ing approximately 65 pounds each and measuring 4½ x 2½ feet x 20 inches (49-50)).[1]

On December 3, 1954, the two cases and their contents were "lost" by plaintiff under the following circumstances:

Plaintiff left his place of business at approximately 10 A.M. (55). He called upon one retailer (55), had lunch (57) and then called upon another retailer (Bruce Jewelers) to whom he displayed the jewelry which he was carrying in the two cases (58). At 2:00 P.M., he put the cases back in the trunk of his car and locked it (58-59).

He then drove a distance of about two blocks to the Joy Jewelry Company (59), where, however, he did not display his merchandise (63). Instead, he drove around the block with Mr. Steltzer, one of the buyers, to an alley where Mr. Steltzer wanted to show him a newly purchased car (63-64).

Plaintiff parked his car behind Mr. Steltzer's car (66) and talked to him (in the driver's seat of Mr. Steltzer's car) for ten or fifteen minutes (68).

He adjusted the rear view mirror so as to be able to watch his car (68). He watched it only "off and on", however, as he was busy inspecting the interior of Mr. Steltzer's car and generally talking with

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[1]Unless otherwise indicated, all references will be to pages of transcript. When preceded by the letter B, references will be to pages and lines of plaintiff's examination under oath (Defendant's Exhibit B).

him about it (68). Moreover, he testified that he could not see the back of his own car "very well" (68).[2]

Plaintiff then drove to the store of another customer, California Premium Service, located some four miles away (70-71). Because of the heavy traffic, it took him about 45 minutes to cover that distance and he arrived there at about 4:30 P.M. (70-71).[3]

It is there (after first talking to the owner, Mr. Nigro, in front of the store and inspecting a diamond in the store) that plaintiff discovered that the two cases were missing from the trunk of his car.

Plaintiff testified that he watched his car while talking to Mr. Nigro (81) and the latter testified that he watched it during the one minute during which plaintiff was examining the diamond (83-5; 123).[4]

Plaintiff further testified that he never saw the back of his car go up either while he was driving or while he was stopped for traffic (55, 60, 71-72); that he did not go to the bathroom during the approximately seven hours that elapsed between 10 A.M. (when he left his place of business in the morning) and the time when he discovered the loss (71); and that, on the two occasions when he was not actually in his car after 2:00 P.M. (namely, when he was visiting with Mr. Steltzer and when he was talking to Mr. Nigro

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[2]When previously examined under oath by defendant as provided in the policy, plaintiff had simply testified that he could not see the back of his car (B 45:21-23).

[3]In his examination under oath, plaintiff had testified that that trip took him only 20 to 25 minutes (B 48:12-13).

[4]In his examination under oath, however, plaintiff had testified that it took him from two to three minutes to inspect the diamond (B 57:2-4).

and inspecting the diamond), he was closely watching the car himself (or was having it watched either by Mr. Steltzer or by Mr. Nigro).

In his examination under oath, plaintiff had unequivocally testified that the back of his car could not have been raised without his noticing it (B, 37:8-9). At the trial, however, he soft pedaled his testimony on the subject and stated that he was not actually watching the back of his car (71-72) and that, although he never saw it go up, he would not have seen it go up unless it had gone up all the way (55, 60, 72).

He further gave it as his opinion that the jewelry cases could be removed from the trunk if the lid were raised only twelve inches (72).

At the end of his examination under oath, plaintiff had testified as follows:

> "Q. Let me ask you this. Can you explain how this loss occurred?
>
> A. I haven't the slightest idea. If I had any idea of how it happened I would have stopped it.
>
> Q. If you had been watching the car every minute of the day as you said you were how would the stuff have been removed?
>
> A. I have had lots of sleepless nights on this myself, and I have woke up in the middle of the night trying to figure it out and I haven't the slightest idea of how it happened.
>
> Q. It is unexplainable to you, then?
>
> A. To me it is unexplainable." (B, 66:15-67:1).

At the trial, plaintiff gave similar testimony as, for example, the following:

"Q. As a matter of fact, the loss of these cases is completely unexplainable to you; isn't that so?

A. Yes, sir; it sure is.

Q. Did you tell the police, immediately after you discovered the loss, that you really didn't know where it happened?

A. Yes, sir.

Q. And is that the fact?

A. I still don't know where it happened." (73)

He also gave it as his opinion, however, that the jewelry could only have been stolen while he was travelling or was stopped for traffic between Mr. Steltzer's store and the California Premium Service Store (72, 101). The trial judge granted one motion to strike that testimony (102) but denied another (72).

To complete the picture, it should be noted that no evidence was found of any tampering with the lock of the trunk (87).

Plaintiff filed this action to recover under the policy alleging that the loss, which he valued at $26,274.51, was covered thereunder.

As far as material to this case, the policy provided as follows:

"5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

* * * * * * *

"(I) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail."

* * * * * * *

"(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken; nor for loss of or damage to goods when sent 'C.O.D.' with the privilege of inspection by the consignee before delivery."

Defendant filed an answer (12-19) in which it denied coverage under the policy and affirmatively alleged that the loss was expressly excluded both by clause 5 (I) and by clause 5 (M). Defendant further affirmatively alleged that plaintiff was in any event precluded from recovering because of his failure to maintain an inventory of the lost merchandise as required by the following provision of the policy:

"8. It is a condition of this insurance that: (A) The Assured will maintain a detailed and itemized inventory of his or their property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company."

With the exception of brief testimony from Mr. Steltzer and from Mr. Nigro, plaintiff was the only witness at the trial.

The trial court found that the jewelry was stolen while plaintiff was actually in his automobile, and that the loss was neither an unexplained loss nor a mysterious disappearance within the meaning of the policy. The trial court further found that plaintiff did maintain an inventory of his property as required by the policy.

The following are the material findings of fact and conclusions of law:

Finding III.

> "That it is true, as alleged in paragraph III of plaintiff's complaint, that on the 15th day of August, 1954, for a valuable consideration paid by plaintiff to defendant, the defendant made, entered into, executed, issued and delivered to plaintiff a contract of insurance under which defendant agreed to pay plaintiff for any loss of or damage to jewelry and other property of the plaintiff which should occur within one year from August 15, 1954."

Finding VII.

> "That it is true, as alleged in paragraph VI of plaintiff's complaint, that on the 3rd day of December, 1954, the plaintiff suffered and sustained a complete and total loss of that certain jewelry of the value of $25,360.01 and those certain sample cases and trays of the value of $914.50; and that such loss occurred by reason of the theft of such property in the County of Los Angeles, State of

California. That the plaintiff's jewelry and sample cases and trays were stolen from the trunk of plaintiff's automobile at a time when the plaintiff was in such vehicle."

Finding XI.

"That it is true that plaintiff's jewelry and sample cases and trays were stolen from plaintiff's automobile, but it is not true, as alleged in the so-called 'Third Defense' of defendant's answer that said jewelry and sample cases and trays were taken 'at a time when neither the assured (the plaintiff) nor a permanent employee of the assured nor a person whose sole duty it was to attend the vehicle, was actually in or upon such vehicle."

Finding XIII.

"That it is not true, as alleged in the so-called 'Fourth Defense' of defendant's answer, that plaintiff's loss was an unexplained loss or mysterious disappearance, and it is not true that plaintiff's loss was an 'unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory."

Finding XV.

"That it is not true, as alleged in the so-called 'Fifth Defense' of defendant's answer, that the plaintiff did not maintain a detailed and itemized inventory of his property as provided in the clause quoted in said so-called 'Fifth Defense.'"

* * * * * * *

Conclusion II.

"That the plaintiff's loss was not excluded from coverage under the contract of insurance in

question by reason of the matters set forth in the so-called 'Third Defense' of defendant's answer."

Conclusion III.

"That the plaintiff's loss was not excluded from coverage under the contract of insurance in question by reason of the matters set forth in the so-called 'Fourth Defense' of defendant's answer."

Conclusion IV.

"That plaintiff's loss was not excluded from coverage under the contract of insurance in question by reason of the condition set forth in the so-called 'Fifth Defense' of defendant's answer." (26-31.)

The trial court accordingly gave judgment for plaintiff in the amount of $15,914.50, $15,000 representing defendant's maximum liability under the policy for a jewelry loss which occurred in an automobile and $914.50 representing the value of plaintiff's sample cases and trays.

SPECIFICATION OF ERRORS.

(1) The trial court erred in finding that, under the policy which it issued to plaintiff, defendant agreed to pay for "any loss of or damage to jewelry and other property of the plaintiff" (Finding III) and in concluding that the loss, if any, sustained by plaintiff was covered by the policy.

Finding III is erroneous for the reason that the policy does not insure "any loss" to the jewelry of plaintiff. The policy insures against "all risks of loss . . . from any cause whatsoever except:". This loss was excluded under clause 5 (I) and clause 5 (M) of the policy.

(2) Assuming, but not conceding, that plaintiff's jewelry, sample cases and trays were stolen from the trunk of his automobile, the trial court erred in finding and concluding that plaintiff was in his automobile at the time when they were stolen (Finding VII and XI, Conclusion II).

Findings VII and XI and Conclusion II are erroneous for the reason that the record contains no evidence to support them.

(3) The trial court erred in finding and concluding that plaintiff's loss was not an unexplained loss or a mysterious disappearance within the meaning of the policy (Finding XIII, Conclusion III).

Finding XIII and Conclusion III are erroneous for the reason that plaintiff's loss was an unexplained loss or a mysterious disappearance within the meaning of the policy.

(4) The trial court erred in finding and concluding that plaintiff maintained an inventory of his property as required by the policy (Finding XV, Conclusion IV).

Finding XV and Conclusion IV are erroneous for the reason that the evidence affirmatively shows that plaintiff did not maintain the inventory required by the policy.

SUMMARY OF THE ARGUMENT.

(1) The Finding That the Jewelry Was Stolen While Plaintiff Was in His Automobile Is Completely Unsupported by the Evidence, for Plaintiff's Testimony on the Subject Must Be Rejected as Inherently Incredible. The Loss Simply Could Not Have Happened as Plaintiff Claims That it Must Have Happened.

(2) The Burden Rested Upon Plaintiff Not Only to Prove That He Was in His Automobile When the Loss Occurred But to Explain the Circumstances Under Which it Occurred.

(3) The Loss Was Also Excluded as an Unexplained Loss or a Mysterious Disappearance of the Jewelry.

(4) Recovery Should in Any Event Have Been Denied Plaintiff Because of His Failure to Maintain the Necessary Inventory.

ARGUMENT.

(1) THE FINDING THAT THE JEWELRY WAS STOLEN WHILE PLAINTIFF WAS IN HIS AUTOMOBILE IS COMPLETELY UNSUPPORTED BY THE EVIDENCE, FOR PLAINTIFF'S TESTIMONY ON THE SUBJECT MUST BE REJECTED AS INHERENTLY INCREDIBLE. THE LOSS SIMPLY COULD NOT HAVE HAPPENED AS PLAINTIFF CLAIMS THAT IT MUST HAVE HAPPENED.

The trial court was faced, as this court is now faced, with a situation in which, if plaintiff's testimony is taken at face value, the two cases of jewelry disappeared under mysterious and unexplained circumstances. At 2 P.M., he locked them in the trunk of his car. Two and a half or three hours later, they were

gone despite the fact that, during the entire period, he either was in the car or was watching it or was having it watched by someone else.

Two cases of jewelry as large and cumbersome as plaintiff's cases do not simply evaporate into thin air. Something must have happened to them and the most logical conclusion is indeed that which the trial court reached, namely, that someone stole them.

It is our contention, however, that no one could have stolen them or, at least, that no one could have stolen them without being noticed if plaintiff had been at all times in or near his car as he claims that he was.

It is accordingly our contention that plaintiff's testimony cannot be taken at face value and that the "loss" must have occurred while he was away from his car, for it cannot have occurred while he was in his car.

To the extent therefore that it would support an inference that the jewelry was stolen while he was in his car, plaintiff's testimony must be rejected as inherently incredible. To the extent that he purported to rely on that testimony to find that the jewelry was stolen while plaintiff was in his car, the findings of the trial judge must be held to be altogether unsupported by the evidence.

Plaintiff contends that the loss must have happened while he was in the car because, so he contends, it cannot have happened at any other time. Our position is that the loss cannot have happened while he was in the car and that it accordingly must be held to have happened while he was away from it.

It is of course settled that, if the loss occurred at such a time, it was not covered by the policy.

We know of no California case construing a clause similar to clause 5 (I) in a jewelers' block policy. A comparable clause is found, however, in automobile liability policies which afford medical payments coverage to persons injured while "in or upon" the automobile. The case of *Christoffer v. Hartford Acc. etc. Co.,* 123 Cal. App. 2d Supp. 979, 267 P. 2d 887, makes it clear that, under the most liberal construction that can be given such a clause, there must be some actual physical contact between the automobile and the injured person.

There is no reason to assume that California courts would construe the clause differently in a jewelers' block policy. In fact, the clause has been given such a construction in all the cases from other states dealing with jewelers' block policies.

The leading case on the subject is *Ruvelson v. St. Paul Fire & Marine Ins. Co.,* 235 Minn. 243, 50 NW 2d 629, decided in 1951 by the Supreme Court of Minnesota. The policy involved in that case insured the property of a wholesale jeweler against loss or damage "arising from any cause whatsoever". It also contained an exclusion clause which, except for one immaterial difference in spelling, was word for word the same as clause 5 (I).

The assured became sick while traveling and left his car for two minutes to go to the restroom and buy a cup of coffee. During that time, his jewelry was stolen.

The court held that the loss was not covered by the policy since it occurred without the actual presence in or upon the car of a person who was in charge of the jewelry. The case is so clearly in point that we deem

it necessary to quote at length from the opinion in an appendix to this brief.

To the same effect, see also:

Dreiblatt v. Taylor, 67 N.Y.S. 2d 378;

Greenberg v. Rhode Island Ins. Co., 66 N.Y.S. 2d 457;

Kinscherf v. St. Paul Fire & Marine Ins. Co., 254 N.Y.S. 382;

Princess Ring Co., Inc. v. Home Ins. Co., 52 R.I. 481, 161 Atl. 292;

Bliss Ring Company v. Globe and Rutgers Fire Ins. Co., 7 Ill. App. 2d 523, 129 N.E. 2d 784.

If it is supported at all, the finding of the trial judge must be supported by plaintiff's testimony that he put the two cases in the trunk of his car at 2 P.M., that no theft occurred while he was in Mr. Steltzer's car, that no theft occurred while he was in Mr. Nigro's store and that it accordingly must have happened while he was in his car.

In other words, it is plaintiff's contention that, either while he was driving bumper to bumper with other cars or while he was waiting for traffic between the Joy Jewelry Company store and that of California Premium Service, someone came to the rear of his car, opened the trunk compartment (presumably with a key which the thief had previously obtained since there apparently was no tampering with the lock of the trunk), raised the lid sufficiently to remove the jewelry cases and shut the trunk again.

It must be remembered that each case weighed 65 pounds and measured 4½ feet by 2½ feet by 20 inches. Plaintiff never explained how a case of that size could be removed from the trunk of his car by raising the

lid only 12 inches. Yet, he unhesitatingly testified that it would have been enough for the thief to raise it 12 inches to remove the cases.

It is our contention that the cases could not be removed from the trunk of the car without his noticing it. Nor could they be removed therefrom while he was in the middle of heavy traffic without the theft being noticed and brought to his attention by one of the many drivers who surrounded him.

The loss simply could not have happened under the circumstances under which plaintiff testified that it must have happened and his testimony to that effect must accordingly be rejected as inherently incredible.

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(2) THE BURDEN RESTED UPON PLAINTIFF NOT ONLY TO PROVE THAT HE WAS IN HIS AUTOMOBILE WHEN THE LOSS OCCURRED BUT TO EXPLAIN THE CIRCUMSTANCES UNDER WHICH IT OCCURRED.

Plaintiff contended at the trial and will undoubtedly contend again on appeal that defendant had the burden of proving not only that the loss occurred while the jewelry was in the automobile but that it occurred while plaintiff was *not* in the automobile.

It is our position that, under clause 5 (I), defendant merely had the burden of proving that the loss occurred while the jewelry was in the automobile. Thereafter, the burden rested on plaintiff to prove that the loss was nevertheless covered by the policy.

We recognize that, in a policy of this type, the burden of proving that a loss is excluded rests upon the

insurance company. Thus, since the policy in this case excluded losses occurring while the jewelry was in an automobile, the burden was on defendant to establish (by its testimony or by that of plaintiff) that the loss occurred while the jewelry was in an automobile.

In order to recover despite that fact, it was then up to plaintiff to establish that he was *actually* in or upon the automobile at the time of the loss. It is *only* in such a case that he could bring himself back within the coverage of the policy. The burden was upon him (it could be on no one else) to prove that his loss came within the exception to the already established exclusion.

Moreover, since unexplained losses and mysterious disappearances are excluded under another clause of the policy, the requirement that the insured be in or upon his automobile at the time of the loss can only be construed as a requirement that *he* be able to explain how an automobile loss occurred and the policy itself must be held to cover only those automobile losses which he can explain.

Thus, in this case, having failed to explain when and how the theft occurred, plaintiff must be held to have failed to sustain the burden which was his under the policy.

Although we found no case dealing with the question of the burden of proof under an automobile exclusion clause such as is involved in this case, there is very persuasive California authority in support of the contention that the burden was upon plaintiff to prove

that he was in or upon his automobile at the time of the loss.

In *Rossini v. St. Paul Fire, etc. Ins. Co.,* 182 Cal. 415, 188 Pac. 564, the plaintiff sued on a fire policy which provided in part as follows:

> "This company will not be liable for loss * * * unless fire ensues (and in that event for damage by fire only), by explosion or any kind of lightning."

In the course of its opinion, the court announced the following rule in connection with the burden of proof under that clause:

> "The burden of proof under the 'explosion exemption' clause of contracts of insurance devolves as follows: There having been shown the execution of a contract, the occurrence of a fire with a resulting loss, and notice to the insurer, if the insurance company claims exemption by reason of the breach of a proviso or condition subsequent, the burden rests upon the company to prove that a loss, or part thereof, falls within one of the prohibitive clauses of the policy. In other words, the company must plead and prove the exception or breach which it sets up as defeating plaintiff's *prima facie* right of recovery. If such burden is sustained and the case proved, for example, to be within the explosion exemption clause by a showing that the explosion occurred first in point of time, plaintiff is then called upon to prove the extent of damage, if any, suffered from the subsequent and resulting fire." (182 Cal. at page 420)

Similarly, in this case, once it was established that the loss was within the automobile exclusion clause,

plaintiff was called upon to prove that he was in or upon his automobile at the time of the loss.

In *Mauck v. Northwestern National Ins. Co.,* 102 Cal. App. 510, 283 Pac. 338, the plaintiff filed suit on a fire policy which provided in part as follows:

> "This company shall not be liable for loss or damage occurring * * * while a building herein described * * * is vacant or unoccupied beyond the period of ten consecutive days."
>
> * * * * * * *
>
> "If the building described hereunder is located within the *incorporated* limits of a city or town, permission is hereby granted for the same to remain vacant or unoccupied without limit of time."

In affirming a judgment for the insurance company, the court stated the following:

> "The vacancy of the house having been established, the burden rested on the plaintiff to show that his grantors and assignors were relieved from the obligation imposed by the vacancy clause of the policy by virtue of the fact that the house was located within an incorporated city or town; that it remained vacant by written permission of the insurer or for any other legally excusable cause." (102 Cal. App. at page 515)

Similarly, in this case, the occurrence of the loss "in an automobile" having been established, the burden rested upon plaintiff to show that it was nevertheless covered under the policy.

(3) THE LOSS WAS ALSO EXCLUDED AS AN UNEXPLAINED LOSS OR A MYSTERIOUS DISAPPEARANCE OF THE JEWELRY.

There would be no coverage under the policy even though plaintiff was in or upon his car at the time when the jewelry disappeared since, according to his own testimony, it disappeared under mysterious and unexplained circumstances. The loss would then be excluded by clause 5 (M) which, as far as material, provides that neither an "unexplained loss" nor a "mysterious disappearance" is covered by the policy.

That clause is plain and unambiguous. A mysterious disappearance is defined in 27 Words and Phrases (1956 Pocket Part, page 222) as a disappearance occurring in an unexplained, unaccountable or unknown manner under puzzling or baffling circumstances. If plaintiff's testimony is taken at face value, the loss was unexplained and the disappearance mysterious.

Hence, whether the trial court chose to believe or not to believe his testimony, the result should have been the same. In either case, there was no coverage under the policy.

Although we were unable to find a case construing a mysterious disappearance clause under a jewelers' block policy, there are a number of cases involving theft policies in which courts have had occasion to construe the terms. The authorities are reviewed in *Casey v. London & Lancashire Indemnity Co.,* 126 N.Y.S. 2d 726, a 1953 New York trial court decision. In the course of its opinion, the court quoted as follows from two earlier decisions:

"The words 'mysterious disappearance' mean a disappearance that is mysterious. The adjective 'mysterious' modifies the noun 'disappearance.' 'Mysterious' means unknown, unaccountable, unexplainable. Therefore, a 'mysterious' disappearance is a *disappearance* which is unexplainable, unaccountable, or in an unknown manner."

* * * * * * *

"Property is 'lost or mislaid' if a person cannot remember where he placed the article and therefore cannot find it. In such a case, there is no mysterious disappearance. It might have been stolen, but the presumption of theft in the policy would not apply because those facts do not establish that the property has disappeared mysteriously. However, assume that a person *remembers* where he placed the article. If it is not in its place when he attempts to recover it, it has disappeared in a mysterious (unknown) manner. The disappearance or vanishment *from its place* is unknown and unexplainable." (126 N.Y.S. 2d at page 728.)

"So then a mysterious disappearance within the meaning of the policy embraces any disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain. A mysterious disappearance is a disappearance under circumstances which excite, and at the same time baffle, wonder or curiosity. Webster, New Int. Dic." (126 N.Y.S. 2d at page 729.)

It is immediately apparent that the foregoing definitions perfectly fit the facts of this case. Plaintiff remembered that he placed the jewelry in his automo-

bile. It was not in its place, however, when he attempted to recover it. It had disappeared in a mysterious or unknown manner. The disappearance or vanishment *from its place* was unknown and unexplainable. It was a disappearance under circumstances which certainly were baffling and certainly excited wonder or curiosity.

It seems clear that, had plaintiff simply testified that he did not know how his jewelry disappeared (without claiming that it disappeared from an automobile), he would have been denied recovery because of the mysterious disappearance exclusion.

The fact that, in addition to testifying that he did not know how the loss occurred, he also testified that it occurred while the jewelry was in an automobile should not place him in a stronger position.

Recovery should be denied on two grounds (automobile exclusion and mysterious disappearance exclusion) rather than just on one ground (mysterious disappearance exclusion).

It must be remembered that we are dealing not only with high value merchandise which is easily stolen but with a policyholder who, like all traveling jewelers, is a target for thieves. Hence it is not surprising that the insurance company should be willing to pay only for those losses which the policyholder can explain.

Nor is it surprising that it should be willing to pay for an automobile loss only in those instances in which such a loss occurred despite the presence of the policy

holder in or upon the automobile. His presence is intended to serve as a deterrent. If it fails as such a deterrent, the company will pay. It should not be made to pay, however, if there was no deterrent at all.

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(4) RECOVERY SHOULD IN ANY EVENT HAVE BEEN DENIED PLAINTIFF BECAUSE OF HIS FAILURE TO MAINTAIN THE NECESSARY INVENTORY.

Moreover, there is a further complete defense to plaintiff's claim.

Plaintiff was required by clause 8 of the policy (as "a condition of this insurance") to "maintain a detailed and itemized inventory of his property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company."

At the trial reference was made to three separate inventories or listings.

One of them, given to the police immediately after the loss (91), admittedly covered merchandise other than that which plaintiff was carrying and obviously fails to comply with the requirements of clause 8.

Another inventory or listing was prepared by plaintiff *after* the loss to be submitted to defendant in support of this claim (93-94). It is similarly insufficient since clause 8 obviously calls for an inventory or listing prepared before the loss.

Finally, plaintiff stated in his examination under oath that he had in his possession another inventory

or listing (prepared *before* the loss) which he would make available to defendant. The examination under oath took place on March 17, 1955. On April 29, 1955, without producing any inventory or listing, plaintiff added two pages to his testimony (92-94). They speak for themselves and we quote them at length:

> "Amended Statement made by Dave Schneider on April 29, 1955.
>
> With reference to my statements with reference to inventories of my merchandise, contained on pages 16 to 22, inclusive, of the attached Reporter's Transcript, I stated I could produce a copy of the inventory that I had of the merchandise I took up to Northern California with me in about the month of October, 1954, and which was the last previous long out-of-town trip that I took prior to the loss on December 3rd, 1954, but immediately after this statement was completed at C. E. Knight's office, on March 17, 1955, I went back to my office to get the same so that Mr. Knight could make a photostatic copy, but upon my return to the office I could not find the same nor could any of my employees find the same, even though we made a very diligent search for it, and that it must have been misplaced or lost, and if I should hereafter find it, I will submit it to C. E. Knight or such other person you may designate in Long Beach, California, so that a copy of the same can be made for and delivered to the Centennial Insurance Company.
>
> "In order to clarify the inventories now in the possession of said insurance company, the one that was submitted on or about December 3,

1954, at the time of the loss, and which was for the use of the police and/or said insurance company, is not an accurate inventory of the merchandise I lost on December 3rd, 1954, and the police and representatives of the insurance company were so informed by me, and was an inventory of the merchandise my salesman had in his two cases which was similar to the line of merchandise in my two cases that I had on the day of the loss, and I believe that said inventory of the salesman's two cases is now in the possession of said insurance company and was given to C. E. Knight at the time of the loss.

"The second inventory referred to is the one attached to my proof of loss made January 20th, 1955, which was prepared in connection with said proof of loss and shortly before the filing of said proof of loss with said insurance company, and this second inventory is a correct inventory of said loss that occurred on December 3rd, 1954, and was prepared by checking my books, records and merchandise.

"All my answers with reference to inventories contained in the Reporter's Transcript hereto attached, are correct, except as they are corrected and modified by the foregoing statement I now make on April 29th, 1955.

Dave Schneider"

It is our earnest contention that there never was any such inventory or listing. We simply cannot believe and we hope that this court will similarly find itself unable to believe in the mysterious disappear-

ance of the inventory on top of the mysterious disappearance of the jewelry itself.

Be that as it may, however, it is our contention that, even if it once existed or still exists, this inventory or listing which plaintiff cannot find is *not* a sufficient compliance with a clause which made it "a condition of this insurance" that plaintiff maintain a listing "in such a manner that the exact amount of loss can be accurately determined therefrom by the Company."

The policy did not merely require that plaintiff *maintain* such a listing. It required that he maintain it in such a way as to make it possible for defendant *to accurately determine the amount of the loss.* This of course can only mean that he was required to maintain the listing *before* the loss *and* to make it available to defendant *after* the loss.

In other words, the policy requires defendant to pay only those losses which it has had an opportunity to check against such an inventory.

No citation is needed (in fact we doubt that plaintiff will contend otherwise) in support of the proposition that plaintiff cannot recover in this action if he did not maintain an inventory or listing at all. The policy itself precludes recovery in such a case (in any event, see the cases cited in the annotations in 39 ALR 1443, 1445, and 125 ALR 350, 352; see also the cases cited in the annotation in 56 ALR 1086 which hold that a delay in the preparation of an inventory beyond the deadline fixed for that purpose by the policy (as for example, 30 days after the effective date of the policy) will avoid the policy).

Needless to say, if a delay in the preparation of an inventory is a sufficient breach to avoid the policy, a complete failure to prepare an inventory will have the same effect; hence, there could be no recovery by plaintiff in this case if plaintiff did not in fact maintain the inventory or listing which he claimed to be unable to find.

Even if plaintiff did prepare the necessary inventory or listing before the loss, however, there can be no recovery in this action since plaintiff failed to make it available to defendant and hence made it impossible for defendant to check the loss.

It may be that, if the inventory or listing had been stolen or destroyed by fire, plaintiff would be excused from producing it. But he certainly cannot be excused upon a mere showing that he no longer can find it.

CONCLUSION.

Plaintiff's loss was outside of the coverage of the policy.

Since he failed to prove that he was in or upon his automobile when the jewelry was stolen, coverage of the loss was excluded by the automobile exclusion clause of the policy.

Moreover, coverage was in any event excluded by the unexplained loss and mysterious disappearance clause of the policy.

Finally, recovery should have been denied plaintiff because of his failure to maintain the necessary inventory.

For the foregoing reasons, the judgment should be reversed.

Dated, San Francisco, California,
March 25, 1957.

Respectfully submitted,
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Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

RUVELSON v. ST. PAUL FIRE & MARINE INS. CO.,
235 Minn. 243, 50 N.W. 2d 629.

"Plaintiffs readily concede that Olson was not actually 'in' the car, but contend that the word 'upon' has a broader meaning and should be construed to be the substantial equivalent of 'in proximity to,' 'in the neighborhood of,' 'in the presence of,' or 'in the charge of.' * * *"

"We have not had occasion heretofore to construe the precise language in the insurance policy which we now have before us. Courts in other jurisdictions have uniformly construed this and similar language adversely to the contentions of plaintiffs.

"The case of *William Kinscherf Co., Inc. v. St. Paul Fire & Marine Ins. Co.,* 234 App. Div. 385, 386, 254 N.Y.S. 382, 383, involved an action on a similar insurance policy containing a clause excepting liability for 'Loss or damage to property insured hereunder whilst in or upon any automobile, motorcycle or horse drawn vehicle unless such conveyance is attended at the time the loss occurs by a permanent employee of the assured. * * *' Loss occurred while the car of plaintiff's employee was parked at the curb, with doors and windows locked, and the employee called on a customer and had lunch. In denying recovery, the New York court said: ' * * * Such language can only be interpreted to mean that if the permanent employee of the plaintiff is not actually within or on the automobile, or so near thereto as to be able to observe a theft of the contents, he shall not be deemed to be in attendance at the time the loss occurs.'

"In *Greenberg v. Rhode Island Ins. Co.,* 188 Misc. 23, 25, 66 N.Y.S. 2d 457, 459, we have an action on a similar policy excepting liability for 'Loss or damage by theft and/or attempted theft from any unattended automobile or motorcycle, unless, at the time the loss occurs, there *is actually in or upon such vehicle* the Assured or a permanent employee of the Assured, or a person whose *sole* duty is to guard the property; * * *.' The court commented upon the difference in language from the Kinscherf case, saying: ' * * * There was no requirement (in the Kinscherf case), as here, that at the time of the loss that the assured or his permanent employee or the person whose sole duty is to guard the property shall be *actually* in or upon the vehicle. "Actual" means that which exists in fact or reality, in contrast to that which is constructive, theoretical or speculative. * * *'

"The facts in the Greenberg case showed that the plaintiff (the insured), who had the jewelry in her possession had left it in the car with all the doors locked and had entered a restaurant. Prior to entering the restaurant, insured requested another party, a stranger standing near the car, to watch over it and promised to pay him a dollar for his services. Insured returned about an hour later and discovered that one of the doors had been pried open and that the property had been stolen. The court denied recovery, saying, 188 Misc. 26, 66 N.Y.S. 2d 459: 'The language in exclusion clause (d) being clear and explicit, it is manifest that the loss falls within the exception and that no liability has attached to the defendant under the policy, and that plaintiff is not entitled to recover.'

"In *Dreiblatt v. Taylor,* 188 Misc. 199, 67 N.Y.S. 2d 378, which was an action on a policy with an exception clause similar to that in the Kinscherf case, the court adhered to that decision.

"In *Princess Ring Co., Inc. v. Home Ins. Co.,* 52 R.I. 481, 483, 161 A. 292, 293, a policy of insurance containing an exception in these words was involved: ' * * * loss or damage to property insured hereunder whilst in or upon any automobile * * * unless such conveyance is attended at the time the loss occurred by a permanent employee of the assured, or by a person whose sole duty is to attend the conveyance *and who at such time shall remain in or upon* the conveyance. * * * '(Italics supplied.)

"The employee of plaintiff to whose care the jewelry was entrusted stopped in front of an apartment house in which his brother lived, intending to take his brother with him to see a prospective customer. He parked his automobile within ten feet of the entrance to the apartment house where his brother lived, turned off the ignition, and left the key in the switch. He then asked his brother's father-in-law, George Mark, who was sitting on a ledge watching his grandchild play, to watch the car while he went to ring the bell to summon his brother. He saw Mr. Mark lean against the car with his elbow inside the window, and walked about 40 feet into the courtyard. As he started to ring the bell he heard Mr. Mark call, and he ran out to his car and saw a strange man at the wheel. He ran around the front of the car and had one foot on the running board and his hand on the steering wheel when he was

pushed off and the car started, and the thief made away with the automobile. The court, in denying recovery, said, 52 R.I. 484, 161 A. 293: ' * * * The phrase "shall remain in or upon the conveyance" fixed the place where the person attending the automobile was required to be when the property insured was "in or upon any automobile." The same phrase is used both in reference to the property insured and the person attending the automobile. Both must be "in or upon" the automobile. "Opportunity makes the thief." If Mr. Mark had been in the automobile, probably the thief would not have entered.' "

* * * * * * *

"The language used in the exception now before us is clear and unequovical. It requires that the assured, or a permanent employe of assured, or a person whose sole duty it is to attend the vehicle be *actually* in or upon the automobile when the loss occurs.

"(4) 3. It is claimed that a strict construction of the language used by the parties in this exception would lead to an absurd and unreasonable result. In support of this contention, plaintiffs cite various hypothetical situations in which an assured or his employe would be compelled to leave the car, either to secure help in an emergency or where he involuntarily would be required to leave the car unattended for some reason or other beyond his control. It is entirely possible under such circumstances that it would work a hardship on the assured if a loss should occur, but the plain fact is that it involves a risk which was assumed by the assured and not by the insurer. The result is no

different from that of any other loss which occurs as a result of some cause not covered by insurance. The mere fact that the assured is compelled to assume a loss which has not been covered by the insurance will not justify courts, by a process of judicial construction, in stretching words beyond their usual meaning to compel an insurer to accept a risk not covered by the policy of insurance. The exception was obviously intended to cover any situation where a loss occurred when the property was not protected by the presence of someone in or upon the car, as required by the language of the exception involved."

* * * * * * * *

"* * * but it is difficult to conceive of a more effective deterrent to a potential thief than the presence of some one *in or upon* an automobile. It is extremely unlikely that an attempt would be made to steal from an automobile under these circumstances, and that is no doubt the very thing the insurer had in mind in requiring actual presence in or upon the automobile."

* * * * * * *

"The language used in the exception involved here is clear and unequivocal. It provides an exception to the general coverage provisions of the policy. The parties were free to contract as they saw fit, and it is not for us to rewrite their contract by construing language to mean something which it obviously does not mean. The plain fact is that this insurance policy covered certain types of losses and excluded others. The loss here involved was one assumed by the owner of the property and not by the insurer." (50 NW 2d at pages 632-636).